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No. 93-1006

Supreme Court, U.S.
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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1993

AUDIEL HIGAREDA and GERARDO TREVIÑO,
Petitioners

v.

UNITED STATES POSTAL SERVICE
BY AND THROUGH ANTHONY FRANK,
POSTMASTER GENERAL,
Defendants

PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the District Court and the Court of Appeals erred in ruling that in order to obtain injunctive relief to enjoin retaliation under Title VII of the Civil Rights Act of 1964, a Claimant must complete the same conditions precedent relevant to asserting substantive claims under the Act.

2. Whether the District Court and the Court of Appeals abused their discretion and erred in dismissing Plaintiffs' Complaint and Motion for Preliminary Injunction.

LIST OF PARTIES

The parties of the proceedings below were the Petitioners, Audiel Higareda and Gerardo Treviño and the Respondent, United States Postal Service.

The parties remain the same before this Court.

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STATUTES AND RULES OF PROCEDURE

42 U.S.C. § 2000e, et seq. (Title VII)

42 U.S.C. § 2000e-3 (Title VII, "Retaliation" Section)

Rule 65 - Federal Rules of Civil Procedure

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UNITED STATES POSTAL SERVICE,
BY AND THROUGH ANTHONY FRANK,
POSTMASTER GENERAL,
Respondents

PETITION FOR WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

Petitioners respectfully pray that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Fifth Circuit, entered in the above-entitled proceeding on September 23, 1993.

OPINIONS BELOW

The opinion of the Court of Appeals for the Fifth Circuit has not been reported. It is reprinted in the appendix hereto, page 26, *infra*.

JURISDICTION

Petitioners are postal workers who filed equal opportunity charges against the Postal Service in the United States District Court for the Southern District of Texas. Petitioner Treviño's Complaint was filed December 10, 1990. Petitioners filed an Amended Complaint on April 29, 1991, so as to add Plaintiff Treviño as a party. The Defendants filed Motions to Dismiss on June 25, 1991. The District Court granted Respondents' motion, dismissing Petitioners' case for lack of subject matter jurisdiction. Petitioners took timely appeal for the final judgment

dismissing Petitioners' case by filing a Notice of Appeal. The Fifth Circuit affirmed the judgment of the District Court, thereby dismissing Petitioners' complaint.

The jurisdiction of this Court to review the decision of the appeals court is invoked under 28 U.S.C., Section 1254.

STATUTES INVOLVED

42 USC §2000e-3 (TITLE VII of the Civil Rights Act of 1964 - Section 704a): It shall be unlawful employment practice for an employer to discriminate against any of his employees or applicants...because he has opposed any practice made unlawful employment practice by this subchapter, or because he has make a charge, testified, assisted, or participated in any manner in any investigation, proceeding, or hearing under this chapter.

FEDERAL RULES OF CIVIL PROCEDURE 65(a): Injunctions

STATEMENT OF CASE

Petitioners, postal workers, filed various EEOC charges against the Postal Service. After filing substantive charges, alleging national origin discrimination (Hispanic), the Petitioners contend that the Postal Service retaliated against them. In response to the alleged retaliation, the workers filed additional charges based on retaliation with the EEOC. Petitioners contend that the pattern of retaliation continued, despite the pending administrative charges.

Since the EEOC lacks administrative enforcement authority, without waiting for the EEOC to complete its investigation and the required conditions precedent which would have enabled Petitioners to assert the substantive claims, Petitioners filed a Complaint in the District Court asking the Court to enjoin the alleged retaliation. No hearing was held on Petitioners' Motion

for Preliminary Injunction.

Petitioners did not assert substantive claims in the Complaint because the Title VII conditions precedent, at the time, had not been completed. Petitioners sought injunctive relief to enjoin employer's conduct alleged to be in violation of Title VII's prohibition against retaliation both in their Complaints and by Motion. In short, Petitioners sought to preserve the *status quo* by enjoining the alleged retaliation, while the EEOC completed its administrative process.

On June 25, 1991, the Respondent filed a Motion to Dismiss. Respondents alleged Petitioners could not seek any relief under Title VII, including injunction against retaliation, because Petitioners had failed to state a claim. Defendant alleged Petitioners could not sustain a claim because the conditions precedent to a Title VII substantive claim had not been

completed. The District Court for the Southern District of Texas agreed and granted Respondents motion, dismissing the case for lack of subject matter jurisdiction. Petitioners took timely appeal for the final judgment dismissing Petitioners' Complaint by filing a Notice of Appeal. On appeal, Petitioners contend that the District Court had subject matter jurisdiction under Title VII to enjoin retaliation even if all conditions precedent had not been completed. Petitioners also contend that, since the application time period precedent had been completed at the time the Court dismissed the case, leave to amend and not dismissal would have been appropriate action by the District Court. The Fifth Circuit Court of Appeals affirmed the District Court's dismissal of Petitioners' Complaint.

Petitioners now file this "Petition for Writ of Certiorari".

REASONS FOR GRANTING THE WRIT

I.

The District Court and the Court of Appeals erred in ruling that in order to obtain injunctive relief to enjoin retaliation under Title VII of the Civil Rights Act of 1964, a Claimant must complete the same conditions precedent relevant to asserting substantive claims under the Act.

II.

The District Court and the Court of Appeals abused their discretion and erred in dismissing Plaintiffs' Complaint and Motion for Preliminary Injunction.

On November 17, 1992, the District Court granted the Respondent's Motion to Dismiss. Petitioners' contend a claimant who has established a *prima facie* case of retaliatory discharge is generally entitled to injunctive relief unless it can be shown that there is no reasonable expectation that discriminatory conduct will recur, or that the discriminatory effects have been completely and irrevocably eradicated.

Denial of injunctive relief is generally subject to reversal only for abuse of discretion of the trial court. However, if the movant makes out a *prima facie* Title VII violation, injunctive relief must be granted unless there is no reasonable expectation that the discriminatory conduct will recur, or that the discriminatory effects have been completely and irrevocably eradicated.

Title VII's prohibition on retaliation is a section that is separate from the Act's general provisions regarding the other protected bases. The retaliation provision has two distinct provisions. One relates to protection in the context of "opposition" to an unlawful practice. The other provision relates to protection in context of "participation" in a Commission investigation.

> (a) It shall be an unlawful employment practice for an employer to discriminate against

> any of his employees or applicants...because he has opposed any practice made an unlawful employment practice by this subchapter, or because he has made a charge, testified, assisted, or participated in any manner in any investigation, proceeding, or hearing under this subchapter. 42 U.S.C. §2000e-3 (emphasis added).

Regarding the conditions precedent under 42 U.S.C., Section 2000e-3, Plaintiffs in a Title VII case bear the burden of persuasion and in order to obtain injunctive relief must show: (1) a reasonable likelihood of success on the merits; (2) that denial of the injunction will likely result in irreparable harm to the movant; (3) the threatened harm to the movant outweighs the possible harm to the defendant; and (4) that granting the injunction will not be adverse to the public interest. E.g., Cox v. City of Chicago, 868 F.2d 217, 219 (7th Cir. 1989).

If the plaintiffs are able to make out a *prima facie* case of retaliatory discharge

under Title VII, injunctive relief should be granted. Ross v. Double Diamond, Inc., 672 F. Supp. 261, 277 (N.D. Tex. 1987). The only apparent exceptions to this rule are where:

> [T]here is no reasonable expectation that the discriminatory conduct will recur, United States v. W.T. Grant Co., 345 U.S. 629, 73 S.Ct. 894, 97 L.Ed.2d 1303, or if interim events have "completely and irrevocably eradicated the effects of the alleged violation." County of Los Angeles v. Davis, 440 U.S. 625, 631, 99 S.Ct. 1379, 1383, 59 L.Ed.2d 642 (1979).

Ross, 672 F. Supp. at 277. Having made out a *prima facie* case, the movant effectively shifts the burden to the defendant to show why injunctive relief should not be granted. The very purpose of an injunction is to provide a prompt remedy.

Other courts have also recognized that injunctive relief is appropriate once a movant has established a *prima facie* violation of Title VII. Double Diamond,

672 F.Supp. 276. Having established the *prima facie* case for a Title VII retaliatory discharge, the burden effectively shifts to the defendant to show why injunctive relief should no be granted. The defendant may rebut the *prima facie* case by showing that its actions were taken because of a non-discriminatory, non-pretextual reason. Id., at 276.

In order to make out a *prima facie* case for retaliatory discharge, a plaintiff must show: (1) that he engaged in activity protected by Title VII; (2) that an adverse employment action occurred; and (3) that there was a causal connection between the participation in the protected activity and the adverse employment decision. Id. at 274 (citing Hamilton v. Rodgers, 791 F.2d 439, 442 (5th Cir. 1986) and Jones v. Flagship Int'l, 793 F.2d 714, 724-26 (5th Cir. 1986)). The retaliatory discharge section, 42 U.S.C., Section

2000e-3, clearly prohibits discrimination against an employee who has opposed unlawful employment practices and has taken advantage of the remedies afforded in the Act. Implicit in the provision is that a non-filing individual who may be a witness before the Commission is also protected under the Act.

Assuming that the factual predicates for a *prima facie* showing of a Title VII violation are present, the District Court's dismissal of the Motion for Preliminary Injunction was an abuse of discretion under the current applicable law. Case law indicates that the traditional requirements for injunctive relief, while still relevant, are easier satisfied under Tile VII.

The fact that the rights involved are of a constitutional nature rather than monetary nature meets the requirements of irreparable harm and lack of an adequate

remedy at law. Once a *prima facie* case has been established, the Act's equitable remedies are available and should be granted regardless of whether or not monetary damages are available. The concepts of irreparable harm and lack of an adequate remedy at law are closely intertwined and in some cases may be indistinguishable. Lewis v. S.S. Baune, 543 F.2d 1115, 1123-24 (5th Cir. 1976. Although theoretically separate, a finding that the movant will suffer irreparable harm may in itself be sufficient to show that the movant has no adequate remedy at law. *Id.* This is an inescapable conclusion, for if a movant cannot be compensated for the wrong he has suffered there is by definition no adequate remedy at law. If an adequate remedy does exist, the movant can suffer no irreparable injury. Thus, although the elements are closely related the most important showing

must be that irreparable injury will occur absent issuance of injunction. Id. at 1121.

The Fifth Circuit has held that where there has been discrimination in employment in violation of Title VII, irreparable injury to the employee should be presumed from the fact of the violation. Middleton-Keirn v. Stone, 655 F.2d 609, 611 (5th Cir. Unit B 1981); Mitchell v. Hayes Int'l Corp., 415 F.2d 1038, 1045 (5th Cir. 1969). Failure of the district court to issue preliminary relief is inconsistent with the Court's holdings and the objectives and purposes of Title VII, allowing a reversal of abuse of discretion. Id. at 1044-45.

Defendant dismisses the above stated principles with a footnote. Defendant's Memorandum in Support of Defendant's Motion to Dismiss, (R.42). Defendant instead launches into a lengthy discussion of the fact that deprivation of mere money or

property are not sufficient to merit injunctive relief. In so doing, Defendant ignores the fact that what is at issue here is the plaintiffs' right to live free from harassment and retaliation in the course of their employment. As indicated in Hayes, this right is superior to a mere monetary interest. Deprivation of this right constitutes irreparable harm, entitling the movant to immediate injunctive relief. Defendants ignore the real issue and instead focuses on an irrelevant point of law.

The third element for the application for injunctive relief has also been satisfied. This element requires the threatened harm to the movant to outweigh the possible harm to the defendant. If a *prima facie* case of discrimination or retaliation has been shown, it is difficult to see how the balance could tip in favor of the defendants. Defendants will suffer

no great financial difficulty or decline in morale as a result of an order enjoining the offensive behavior. By contrast, if injunctive relief is not granted, plaintiffs will suffer irreparable harm due the continued harassment and retaliation of defendants.

Similarly, the public has an interest in eradicating oppressive and discriminatory employment practices. These practices have a negative effect not only on the affected workers, but on the labor force of the country as a whole. Hayes, 415 F.2d at 1045. The public interest will be served by granting the injunction, and disserved by denying it.

VI. Conclusion

Petitioners submit that a Title VII Plaintiff need not wait until the EEOC has completed the administrative process before Plaintiff can obtain injunctive protection against retaliation in the federal courts. Assuming that the factual predicates for a *prima facie* showing of a Title VII violation are present, the District Court's dismissal of the motion for preliminary injunction was an abuse of discretion. Case law indicates that the traditional requirements for injunctive relief, while still relevant, are easier satisfied under Title VII.

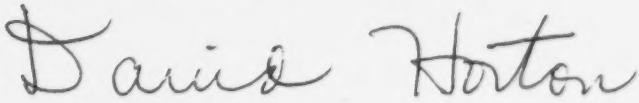
The Fifth Circuit has held that in Title VII cases, the court is to presume that the employee has suffered irreparable injury from the fact of the violation. Also, the fact that the rights involved are of a constitutional rather than monetary nature meets the requirements of

irreparable harm and lack of an adequate remedy at law.

Once a *prima facie* case has been established, the Act's equitable remedies are available and should be granted regardless of whether or not monetary damages might be available. The decision to award injunctive relief in such cases is not within the discretion of the District Court, and relief should be awarded automatically absent proof that conditions have so changed that it is no longer necessary.

Therefore, the District Court erred in granting Respondent's Motion to Dismiss and dismissing Petitioners' Complaint for lack of subject matter jurisdiction. The District Court also erred in not granting Petitioners' request for injunctive relief.

Respectfully submitted,



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